PUBLIC MATTER

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THE STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

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| In the Matter of | ) Case Number 08-J-12807 |
| | ) |
| JAMES D. HOLLISTER, | ) NOTICE OF DISCIPLINARY CHARGES |
| No. 44244, | ) |
| | ) (Business & Professions Code § 6049.1; |
| | ) Rules of Procedure of the State Bar, |
| A Member of the State Bar. | ) rules 620 to 625) |

**NOTICE - FAILURE TO RESPOND!**

**IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, OR IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL, (1) YOUR DEFAULT SHALL BE ENTERED, (2) YOU SHALL BE ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNLESS THE DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE RULES OF PROCEDURE OF THE STATE BAR, (3) YOU SHALL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOUR DEFAULT IS SET ASIDE, AND (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE.**

**STATE BAR RULES REQUIRE YOU TO FILE YOUR WRITTEN RESPONSE TO THIS NOTICE WITHIN TWENTY DAYS AFTER SERVICE.**

**IF YOUR DEFAULT IS ENTERED AND THE DISCIPLINE IMPOSED BY THE SUPREME COURT IN THIS PROCEEDING INCLUDES A PERIOD OF ACTUAL SUSPENSION, YOU WILL REMAIN SUSPENDED FROM THE PRACTICE OF LAW FOR AT LEAST THE PERIOD OF TIME SPECIFIED BY THE SUPREME COURT. IN ADDITION, THE ACTUAL SUSPENSION WILL CONTINUE UNTIL YOU HAVE REQUESTED, AND THE STATE BAR COURT HAS GRANTED, A MOTION FOR TERMINATION OF THE**

**ACTUAL SUSPENSION. AS A CONDITION FOR TERMINATING THE ACTUAL SUSPENSION, THE STATE BAR COURT MAY PLACE YOU ON PROBATION AND REQUIRE YOU TO COMPLY WITH SUCH CONDITIONS OF PROBATION AS THE STATE BAR COURT DEEMS APPROPRIATE. SEE RULE 205, RULES OF PROCEDURE FOR STATE BAR COURT PROCEEDINGS.**

The State Bar of California alleges:

JURISDICTION

1. James D. Hollister ("respondent") was admitted to the practice of law in the State of California on June 26, 1969n was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

PROFESSIONAL MISCONDUCT IN A FOREIGN JURISDICTION

2. On or about March 13, 2008, the United States Court of Appeals for the Ninth Circuit ordered that respondent be disciplined upon findings that respondent had committed professional misconduct in that jurisdiction as set forth in the order of March 13, 2008. Thereafter, the decision of the foreign jurisdiction became final on July 10, 2008.

3. A certified copy of the final order of disciplinary action of the foreign jurisdiction is attached as Exhibit 1, and incorporated by reference.

4. A copy of the statutes, rules or court orders of the foreign jurisdiction found to have been violated by respondent is attached as Exhibit 2, and incorporated by reference.

5. Respondent's culpability as determined by the foreign jurisdiction indicates that the following California statutes or rules have been violated or warrant the filing of this Notice of Disciplinary Charges: Rules of Professional Conduct 1-400(c), 1-600, 3-110(A), 1-300(A), 1-320(A), 1-320(B) and 3-310(F); Business & Professions Code §§ 6103, 6105 and 6106.

ISSUES FOR DISCIPLINARY PROCEEDINGS

6. The attached findings and final order are conclusive evidence that respondent is culpable of professional misconduct in this state subject only to the following issues:

A. The degree of discipline to impose;

B. Whether, as a matter of law, respondent's culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline

in the State of California under the laws or rules binding upon members of the State Bar at the time the member committed misconduct in such other jurisdiction; and

C. Whether the proceedings of the other jurisdiction lacked fundamental constitutional protection.

7. Respondent shall bear the burden of proof with regard to the issues set forth in subparagraphs B and C of the preceding paragraph.

**NOTICE - INACTIVE ENROLLMENT!**

**YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULE 101(c), RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.**

**NOTICE - COST ASSESSMENT!**

**IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10. SEE RULE 280, RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.**

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL

Dated: November 12, 2008

By: _____
MARIA J. OROPEZA
Deputy Trial Counsel

FILED

MAR 13 2008

MOLLY DWYER, ACTING CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| In re: JAMES D. HOLLISTER, Esq., Admitted to the bar of the Ninth Circuit: June 26, 1969,<br><br>Respondent, | No. 07-80199<br><br>REPORT AND RECOMMENDATION |

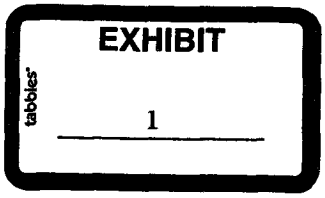
Before: Peter L. Shaw, Appellate Commissioner

I
Background

A. Order To Show Cause

On December 6, 2007, the court ordered respondent James D. Hollister, Esquire, to show cause in writing why he should not be sanctioned in an amount not less than $5,000, suspended, or disbarred for repeated violations of the court's rules and orders and the rules of professional conduct, and for conduct unbecoming a member of this court's bar in many of the cases in which he has appeared before the court. *See* Fed. R. App. P. 46(b)(1)(B) & (c); 9th Cir. R. 46-2; Cir. Adv. Comm. N. to R. 46-2; *see also* Cal. Prof'l Conduct R. 3-110(A) (Failing To Act Competently); Cal. Bus. & Prof. Code § 6068 (Duties of Attorney); § 6103 (Sanctions for Violation of Court Order or Attorney's Duties); *In re Snyder*, 472





U.S. 634, 645-46 & n.7 (1985) (court may consider codes of professional conduct in determining whether an attorney's conduct falls below the standards of the profession).

The order to show cause stated that Hollister had appeared in 18 immigration cases before the court since 2004, and eight of those cases were dismissed because he failed to file an opening brief. In an additional three cases, Hollister failed to file a response to the government's motion for summary disposition.

The order to show cause also stated that the motions for stay of removal that Hollister filed in the 18 immigration cases were perfunctory and failed to meet well-established standards. The order noted that in five cases, the denial of Hollister's perfunctory stay motion also ended the stay of the voluntary departure period, threatening the loss of an important benefit Hollister's clients had obtained during immigration proceedings.

The order to show cause also described how the briefs Hollister has filed in this court have been characterized by references to outdated law and a failure to cite specific evidence in the administrative record. As a result, those briefs have appeared generic and recycled.

Finally, the order to show cause set forth the court's more general concern that Hollister has not competently managed his appellate practice, repeatedly missing deadlines and misreading important documents. The order noted that in three cases where Hollister filed a motion to file a late brief, the briefs were already, respectively, ten, eight, and four months late, and the postal difficulties cited as an explanation were at least partially attributable to his failure to change his address with the court. In a subsequent motion to reinstate a case dismissed for failure to file a brief, Hollister again blamed the postal service, although he conceded in two other reinstatement motions that he had simply overlooked the briefing schedule sent to him by the court.

B. Hollister's Response to the Order to Show Cause

After obtaining a timely extension of time to file a response to the order to show cause, Hollister filed a detailed response, but did not request a hearing.[1] *See* Fed. R. App. P. 46(b)(3), (c); 9th Cir. R. 46-2(e). Hollister's response does not address the specifics of the order to show cause, but instead generally describes the

[1] In his request for an extension of time, Hollister specifically stated that he did not want a hearing.

nature of his immigration practice. In doing so, Hollister implicates himself in practices that may be even more serious than those identified in the order to show cause.

In an overview of his practice, Hollister explained that he was new to both the Ninth Circuit and immigration law when he "was approached by an immigration consultant named Albert Villela who asked me if I would be interested in trying immigration cases on a case-by-case basis." These engagements would also include representation before the Board of Immigration Appeal and the Ninth Circuit. Hollister explained that he received a set sum for representing Villela's clients at trial, and "BIA and Ninth Circuit Appeals were also paid on a set sum which I receive[d] when I complete[d] the briefs and turn[ed] them over to Mr. Villela for filing."

In response to the court's order that he produce the retainer agreements he executed with his clients, Hollister wrote: "Under the above arrangement there are no retainer agreements between the Respondents and myself. There is a letter between Mr. Villela and me regarding fees." Hollister acknowledged that "it may appear, given the background, that I may have received compensation without performing the work," but he assured the court that that has never been the case.

Hollister also acknowledged there was a "mail problem" that resulted in late briefs: "I had asked Mr. Villela to make sure that I notified all appropriate parties of my new address when I moved here in April, 2005. Apparently this was not done correctly and my immigration and Ninth Circuit mail was not consistent." Hollister emphasized that when problems were discovered, he "tried to take immediate steps to correct the situation."

Hollister noted the court's concern that he recycled his briefs, and responded: "This is true to an extent but I usually tried to make changes or additions at the Ninth (*sic*) level, while still using the base language I earlier prepared on the same issues."

Hollister acknowledged that Mr. Villela is "held in disfavor" by the Immigration Court in San Francisco, and expressed his belief that he has suffered from the "repercussions" of this situation. Hollister conceded that severing his ties to Villela would be one option, but dislikes that option because it would effectively end his own immigration practice, and because he believes his own involvement in the cases has led to "improvement" in Villela's practices. Hollister readily admits he knew less about immigration law than Villela did when they began their association, "and it's taken a while for me to feel comfortable giving the

directions." Hollister proposed that the situation would continue to improve if he were allowed to "embark on my own program of improving my appellate skills through education and any other resource I can find."

Hollister concluded his response to the court's order to show cause by informing the court that he is 68 years old, in need of hip surgery, and uses his practice income to supplement his social security benefits.

C. Additional Conduct

Hollister has filed no new cases since the court issued its order to show cause. He filed a five-page opening brief in *Komal v. Keisler*, No. 07-70316 that contained a single reference to the record below and no discussion of relevant case law.

## II. Discussion

A. Applicable Legal Standards

"A member of the court's bar is subject to suspension or disbarment by the court if the member . . . is guilty of conduct unbecoming a member of the court's bar." Fed. R. App. P. 46(b)(1)(B); *see Gadda v. Ashcroft*, 377 F.3d 934, 947 (9th

Cir. 2004) (court also has inherent authority to suspend or disbar attorneys who perform incompetently in immigration proceedings). Furthermore, the court "may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule." Fed. R. App. P. 46(c). A court need not find intentional conduct to discipline an attorney for conduct unbecoming a member of the bar pursuant to Federal Rule of Appellate Procedure 46; lack of diligence that impairs the deliberations of the court is sufficient. *Gadda*, 377 F.3d at 947.

"Conduct unbecoming a member of the court's bar" means "conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice." *In re Snyder*, 472 U.S. 634, 645 (1985); *Gadda*, 377 F.3d at 946. In addition to case law and applicable court rules, the court may consider codes of professional conduct in determining whether an attorney's conduct falls below the standards of the profession. *See In re Snyder*, 472 U.S. at 645, 646 n.7 (referring to state rules of professional conduct, and the American Bar Association's Model Rules of Professional Conduct and Model Code of Professional Responsibility); *United States v. Swanson*, 943 F.2d 1070, 1076 (9th Cir. 1991).

In assessing the appropriateness of a particular sanction, the court may consider the American Bar Association's Standards for Imposing Lawyer Sanctions, which were promulgated to aid enforcement of the ABA's Model Rules of Professional Conduct. *See Swanson*, 943 F.2d at 1076; *see also* ABA Joint Comm. on Prof'l Standards, *Standards for Imposing Lawyer Sanctions* (1984, rev. 1992), *available at* http://www.abanet.org/cpr/regulation/standards_sanctions.pdf ("*Standards*"). Under these standards, a court should generally consider: (a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. *See Standards* § 3.0. The *Standards* also set out various forms of suggested discipline based on the type of misconduct involved. *See id.* §§ 4.0-8.4.

B. Failure to Prosecute

The December 11, 2007 order to show cause alleged that Hollister was the attorney of record for the following eight petitions for review that were dismissed for failure to prosecute: *Lualala v. Gonzales*, No. 04-75431; *Ali v. Gonzales*, No. 05-70814; *Vilash v. Gonzales*, No. 05-71615; *Rajiv Govind v. Gonzales*, No. 06-71812; *Ravinesh Govind v. Gonzales*, No. 06-72378;

No. 07-80199

*Rodriguez Montoya v. Gonzales*, No. 06-72508; *Kishore Singh v. Gonzales*, No. 06-74394; *Prasad v. Gonzales*, No. 07-70322.

Hollister does not explain, or even address, these dismissals in his response to the order to show cause, making it difficult to determine whether the failure to prosecute these cases was the result of the clients' decisions or Hollister's own lack of diligence. The explanations Hollister offered in his motions to reinstate proceedings in three of these cases point to the latter. In *Ali v. Gonzales*, No. 05-70814, Hollister's motion blamed the postal service for his failure to receive the administrative record but, as the court's order noted, Hollister was already on notice that some of his court mail was not reaching him, a circumstance attributable in large part to his failure to notify the court of his change his address in violation of Ninth Circuit Rule 46-3. In the other two reinstatement motions, for *Rajiv Govind v. Gonzales*, No. 06-71812 and *Kishore Singh v. Gonzales*, No. 06-74394, Hollister admitted he overlooked the briefing schedule that he had received.

It is impossible to determine whether Hollister's carelessness or client choices resulted in the remaining five dismissals. Even if a client is unavailable or no longer wishes to pursue a petition for review, the proper action pursuant to

the court's rules is to file a motion to withdraw as counsel or to dismiss the petition for review. *See* Fed. R. App. P. 42(b); Ninth Circuit R. 42-1. Hollister's violation of the court's rules and lack of diligence interfered with the judicial process. *See* Cal. R. Prof. Cond. 3-110; *Standards*, §§ 4.4, 6.2.

C. Perfunctory stay motions

Hollister's response to the order to show cause does not address the court's concerns about the quality of his stay motions. As noted in the order, Hollister is scrupulous about filing a motion for stay of removal in conjunction with the petition for review, but the vast majority of the stay motions are perfunctory, and they fail to satisfy the standards for such motions set forth in *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). As a result, stays have been denied in half of Hollister's cases. Moreover, the denial of Hollister's perfunctory stay motion also ended the stay of the voluntary departure period in five cases. *See Jasbeer Singh v. Gonzales*, No. 04-73125; *Raj v. Gonzales*, No. 04-74754; *Lualala v. Gonzales*, No. 04-75431; *Pedroza v. Gonzales*, No. 06-75782; *Prasad v. Gonzales*, No. 07-70322. Hollister's conduct with respect to stay motions has

demonstrated a lack of competence that has harmed his clients. *See* Cal. R. Prof. Cond. 3-110; *Standards*, §§ 4.5.

D. Inadequate Briefs

Hollister's response to the court's order to show cause does not specifically address the two chronic failings of his briefs: the failure to cite the record, and the invocation of outdated law. Instead, Hollister refers generally to his relative ignorance of immigration law. He does not dispute the charge that his briefs regularly fail to meet the requirements set forth in Federal Rule of Appellate Procedure 28(a). Hollister's practice with respect to briefing has demonstrated a lack of competence that has harmed his clients. *See* Cal. R. Prof. Cond. 3-110; *Standards*, §§ 4.5.

E. Concerns About Hollister's Practice

In response to the court's concern that his practice is marked by carelessness and disorganization, Hollister acknowledges "several missed deadlines," but emphasizes that he has always taken "immediate steps to correct the situation" once a problem was discovered. Apart from a reference to a now-

resolved "mail problem," however, Hollister fails to explain whether and how he has taken steps to ensure that such problems do not arise.

Hollister's response to the court's order implies that many of his difficulties are the result of his relationship with Mr. Villela, the immigration consultant, but his response raises troubling concerns about that relationship. By his own admission, Hollister accepted the referral of multiple clients, as well as fees, from Villela, a non-attorney, for appearing before this court in cases without a written fee agreement. Yet California Rule of Professional Conduct 3-310(F) provides that "a member [of the State Bar of California] shall not accept compensation for representing a client from one other than the client unless:

> (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
>
> (2) Information relating to representation of the client is protected as required by Business and Professions Code 6068, subdivision (e); and
>
> (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
>
> (a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public."

Hollister's admission that he deferred to Mr. Villela's judgment shows that condition (1) was violated and, by admitting that he has no written agreements with his clients, Hollister has conceded that he violated condition (3) as well.[2]

The ethical problems with Hollister's arrangement with Villela extend beyond the rules involving referrals. At one point in his response to the court's order, Hollister explains that "[t]he initial problem for me was, at the beginning, Mr. Villela knew more about immigration law than did I and it's taken a while for me to feel comfortable giving the directions." This explanation is both vague and disturbing, because it is not clear in what sense Mr. Villela, a non-attorney,

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[2] In addition, California Business & Professions Code § 6148 provides that, in non-contingency-fee cases, the contract for legal services "shall be in writing" where "it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000)." Hollister indicates that "[o]n trial matters I would be paid a set sum between $500 and $700 depending on the type of case. . . . BIA and Ninth Circuit Appeals were also paid on a set sum which I receive[d] when I complete[d] the briefs and turn[ed] them over to Mr. Villela for filing." Because Hollister frequently represented the same clients at trial, before the BIA, and in the Ninth Circuit, it is likely that his representation frequently triggered the requirements of § 6148. Moreover, it is unknown how much more Villela charged the client.

might have been "giving the directions" at any point in their professional relationship.

Hollister also writes: "I appreciate the Court's concern that it may appear, given the background, that I may have received compensation without performing the work, but I must stress that I have not, and never, ever, would do that." This statement is not responsive to any charge made in the order to show cause, but it correctly anticipates the court's concern that Hollister may be assisting in the unauthorized practice of law to the degree he is lending his name to legal work product that has actually been prepared by a non-lawyer.

The court's concerns here are magnified by its prior experience with attorneys working for Mr. Villela, *see In re Stevens*, No. 03-80015, and the similarity between Hollister's briefs and those submitted by other attorneys working for Mr. Villela. In addition, a number of pleadings in Hollister's cases contain block signatures that appear to be initialed by Villela's employees. *See Vidya Dhar Singh v. Gonzales,* No. 05-76582 (motion for extension of time to file petition for rehearing); *Lal v. Gonzales*, No. 06-73775 (motion to file late brief); *Komal v. Mukasey*, No. 07-70316 (motions for extension of time). These motions violate Federal Rule of Appellate Procedure 32(d), which requires

"every brief, motion, or other paper filed with the court" by represented parties to be signed by counsel, and they raise serious questions about the extent of Hollister's involvement in the prosecution of his cases.

In view of the concerns raised by Hollister's own characterization of his immigration practice, he also has violated or may have violated one or more of the following additional ethical rules:

(1) California Rule of Professional Conduct 1-300(A), which provides that "[a] member [of the State Bar of California] shall not aid any person or entity in the unauthorized practice of law;"[3]

(2) California Rule of Professional Conduct 1-320(A), which provides that "[n]either a member [of the State Bar of California] nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer," subject to certain exceptions not applicable here;

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[3] Business & Professions Code §6126 governs the unauthorized practice of law, and applies to Villela's conduct here. *See In re Valinoti*, 2002 WL 31907316, at *13 ("the preparation and filing of immigration applications, pleadings, and documents by the nonattorney [immigration services] providers in this proceeding fall[s] within California's definition of the unauthorized practice of law"). Section 6126 provides that "any person . . . practicing law who is not an active member of the State Bar . . . is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both that fine and imprisonment."

(3) California Rule of Professional Conduct 1-320(B), which provides in part that "[a] member [of the State Bar of California] shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client or as a reward for having made a recommendation resulting in the employment of the member or the member's law firm by a client,"

(4) California Rule of Professional Conduct 1-400(C), which provides in part that "[a] solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California;"

(5) California Rule of Professional Conduct 1-600, which provides that "[a] member [of the State Bar of California] shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows

any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by [the Rules of Professional Conduct], or otherwise violates the State Bar Act or [the] rules;"

(6) California Business & Professions Code § 6105, which provides that "[ l]ending his name to be used as attorney by another person who is not an attorney constitutes a cause for disbarment or suspension;" and

(7) California Business & Professions Code § 6106, which provides that "[t]he commission of any act involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." *See In re Valinoti*, 2002 WL 31907316, at *12, *53 (respondent's willful violation of rule 1-300(A), deliberately aiding and abetting the unauthorized practice of law, and rule 3-310(F), repeatedly and deliberately permitting non-attorney immigration service providers who referred clients to him to pay his fees, rose to a level involving moral turpitude in violation of section 6106).

F. Aggravating and Mitigating Factors

Because the original charging document in this proceeding did not order Hollister to show cause why he should not be disciplined for a relationship with a non-attorney that violated one or more rules of professional conduct, that relationship cannot serve as an independent ground of discipline, absent an amended order to show cause and further investigation. Such uncharged conduct may, however, be considered an aggravating factor, *see Edwards v. State Bar*, 801 P.2d 396, 400-01 (Cal. 1990). As noted above, Hollister's own description of his relationship with Mr. Villela establishes, at a minimum, a violation of California Rule of Professional Conduct 3-310(F).

In addition, the ABA "Standards" set out aggravating and mitigating factors that justify an increase or reduction in the degree of discipline to be imposed. *See Standards* §§ 9.2, 9.3. The relevant aggravating factors here are:

(1) *Pattern of misconduct and multiple offenses* ( *Standards* §§ 9.22(c), (d)) -- Hollister's conduct described in the court's order to show cause -- the failure to prosecute cases, the filing of perfunctory stay motions and inadequate briefs -- was not confined to a few cases, but occurred in virtually all of the 18 cases in which Hollister has appeared before this court since 2004;

(2) *Refusal to acknowledge the wrongful nature of his conduct* ( *Standards* § 9.22(g)) -- Hollister's response to the court's order to show cause takes responsibility in the most general terms, but the complete lack of specificity in the response can only be explained by a lack of familiarity with his own cases, or a lack of familiarity with the substantive issues detailed in the order to show cause. In addition, by explaining his conduct in terms of his relationship to Mr. Villela, Hollister's response fails to acknowledge the real and potential improprieties of that relationship; and

(3) *Vulnerability of the victim* ( *Standards* §§ 9.22(h)) -- Incompetent representation in asylum and immigration cases can have devastating consequences, namely deportation or removal; in addition, clients who have been deported or removed are often not in a position to file claims with the State Bar or other agencies regarding their attorneys' unethical conduct and therefore the misconduct is not easily remedied.

Hollister appears to make three arguments in mitigation: (1) that he was new to immigration practice when he began representing clients in the Ninth Circuit in 2004, and he has subsequently improved; (2) that he has been able to

effect positive change in the way in which the appeals of Mr. Villela's clients are handled; and (3) that he is 68 and in poor health.

Hollister's first argument is unavailing because an attorney's duty to represent his clients competently applies under all circumstances. California Rule of Professional Conduct 3-110(C) specifically provides:

> If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with, or, where applicable, professionally consulting *another lawyer* reasonably believed to be competent , or 2) by acquiring sufficient learning and skill before performance is required. (emphasis added)

Furthermore, Hollister's attempt to argue that the problems with his representations are limited to his earlier cases is belied by the order to show cause, which demonstrates problems in virtually every case he has filed in the Ninth Circuit. Hollister does not support his vague claim of "improvement" with reference to any case.

Hollister's second argument is also unavailing because the asserted mitigating factor–his alleged good influence on Mr. Villela's practice–is based on

a professional relationship that itself violates one or more rules of professional conduct. Moreover, Hollister offers no specifics about the alleged "improvement."

The ABA standards do recognize "personal or emotional problems," and "physical disability" as mitigating factors that may justify a reduction in the degree of discipline to be imposed. *See Standards* §§ 9.32(c), (h). Hollister does not, however, offer his current health situation as an explanation for his past actions, only as a general equitable consideration. Hollister's appeal to his personal circumstances is of minimal value as a mitigating factor.

G. Appropriate Level Of Discipline

Hollister's response to the court's order concedes that he engaged in an area of law in which he knew he was not competent. In view of the pervasive lack of diligence and competence that Hollister has displayed, his conduct is subject to suspension, at a minimum. *See Standards* §§ 4.41-42, 4.51-52. Because the aggravating factors are numerous and serious, even disbarment would not be inappropriate.

Hollister proposes that he embark on a process of education, but he opposes severing his relationship with Mr. Villela. Hollister's failure to

appreciate the problems with that relationship demonstrates why he should be suspended from practice before the Ninth Circuit, and required to engage in comprehensive ethical and appellate practice training as a condition for reinstatement.

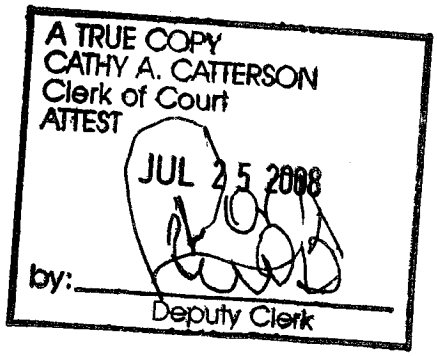
## III
## Recommendation

Hollister should be suspended from the practice of law before this court for thirty months, effective immediately upon entry of an order by the court adopting this report and recommendation. Hollister should be required, within 14 days after the court's order, to serve the order on his clients in all pending cases, inform the clients that they must obtain new counsel, and turn over all client files and materials to the clients. Also within 14 days, Hollister should be required to file proof with the court that he has completed the above requirements. The court may wish to consider substituting pro bono counsel for Hollister in his pending cases.

Hollister's reinstatement to practice before this court should be conditioned on a showing that he is in good standing before all courts in which he is admitted, with no disciplinary proceedings pending, and that he is familiar with, willing to

comply with, and capable of complying promptly and diligently with all applicable court and ethical rules and this court's orders. Hollister's reinstatement should also be conditioned upon the successful completion of no fewer than 12 hour-units of continuing legal education, certified by the State Bar of California, in the areas of ethics, immigration law, appellate practice, and law office management, in addition to those hour-units required of all active attorneys.

The court's order and this report and recommendation should be served on the California State Bar, the United States Attorney for the Northern District of California, the Office of the Attorney General for the State of California, and the Alameda County District Attorney, for further investigation of Hollister's and Villela's conduct, as appropriate.



FILED

MAR 13 2008

MOLLY DWYER, ACTING CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| In re:<br><br>JAMES D. HOLLISTER, Esq., Admitted to the bar of the Ninth Circuit: June 26, 1969,<br><br>Respondent, | No. 07-80199<br><br>ORDER |

Before: Peter L. Shaw, Appellate Commissioner

The Clerk shall serve on respondent by certified mail, return receipt requested, a copy of the Report and Recommendation filed contemporaneously with this order.

Within 21 days after this order is filed, respondent may file objections to the Report and Recommendation. *See* 9th Cir. R. 46-2(f). The Clerk shall forward respondent's objections, if any, to the Appellate Commissioner.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
JUL 25 2008
by: _____
Deputy Clerk

ES\AppellateCommissioner

FILED

JUL 10 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| In re: JAMES D. HOLLISTER, Esq., Admitted to the bar of the Ninth Circuit: June 26, 1969,<br><br>Respondent, | No. 07-80199<br><br>ORDER |

Before: REINHARDT, BERZON, and M. SMITH, Circuit Judges

On March 13, 2008, the Appellate Commissioner filed a report and recommendation regarding the proposed discipline of respondent James D. Hollister, Esq. Respondent Hollister was allowed 21 days to object to the report and recommendation. After three attempts, the report and recommendation was successfully served on Hollister, and he has not filed objections.

The report and recommendation is adopted in full. For his violations of the court's rules and orders and ethical rules set forth in the Report and Recommendation, respondent James D. Hollister, Esq., is suspended from the practice of law in this court for 30 months, effective on the filing date of this order. Fed. R. App. P. 46(c).

Respondent Hollister may file a petition for reinstatement after the period of suspension pursuant to Ninth Circuit Rule 46-2(h). Hollister shall file the petition

using this docket number and include: (1) this order; (2) a written showing that Hollister is familiar with, willing to comply with, and capable of complying promptly and diligently with the Federal Rules of Appellate Procedure, Ninth Circuit Rules, and this court's orders; (3) evidence that he is in good standing, with no discipline pending, in all courts and bars in which he is admitted; and (4) proof that he has successfully completed no fewer than 12 hour-units of continuing legal education, certified by the State Bar of California, in the areas of ethics, immigration law, appellate practice, and law office management, in addition to those hour-units required of all active attorneys.

Within 14 days after the date of this order, respondent Hollister shall file notices of withdrawal in all pending cases in which he is counsel of record, serve this order on his clients in all pending cases, and turn over all client files and materials to the clients. The term "pending cases" includes cases where the briefing has been concluded, but there has been no final decision by this court. According to the court's records, respondent Hollister appears as the counsel of record in the following pending cases: *Razak v. Mukasey*, No. 04-71908; *Rajiv Govind v. Mukasey*, No. 06-71812; *Komal v. Mukasey*, No. 07-70316; *Ali v. Mukasey*; No. 07-70655.

Additionally, respondent Hollister shall inform his clients in the pending cases that they must: (1) obtain new counsel; or (2) notify the court that they wish to represent themselves; or (3) request that the court appoint counsel for them. He shall further notify them that he can no longer provide any legal assistance for them or collect fees for future services in this court. Also within 14 days after the date of this order, respondent Hollister shall file proof with the court that he has completed the above requirements and send to the court the addresses of his clients in all pending cases.

Failure to comply with this order within the time permitted may result in the imposition of monetary sanctions of $1,000 or more, without further notice, for each case in which respondent Hollister fails to fulfill the requirements of this order.

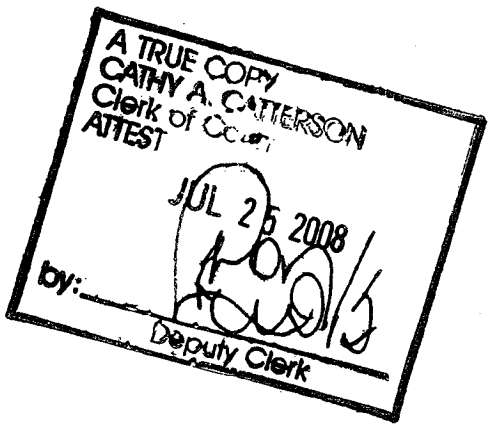
The Clerk shall change this court's records to reflect that respondent Hollister has been suspended and is no longer eligible to practice before the Ninth Circuit.

The Clerk shall serve this order and the Appellate Commissioner's March 13, 2008 report and recommendation on the United States Department of Justice

No. 06-80000

Executive Office for Immigration Review and the State Bar of California for appropriate further investigation.

The Clerk also shall serve this order on respondent Hollister by certified mail, return receipt requested.



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U.S.Ct. of App. **9th Cir. Rule 42-1,** 28 U.S.C.A.

C

United States Code Annotated Currentness

United States **Court** of Appeals for the **Ninth Circuit** (Refs & Annos)

Title VII. General Provisions

**Rule 42-1**. Dismissal for Failure to Prosecute

When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with **rules** requiring processing the appeal for hearing, an order may be entered by the clerk dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the **Court** may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal.

<Federal **Rules** of Appellate Procedure also govern procedure in appeals to United States **courts** of appeals>

LIBRARY REFERENCES

American Digest System

Dismissal, see Federal **Courts** ⚿722.

U. S. Ct. of App. **9th Cir. Rule 42-1,** 28 U.S.C.A., CTA9 **Rule 42-1**

Amendments received to 08-01-08

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EXHIBIT

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Federal Rules of Appellate Procedure Rule 28, 28 U.S.C.A.

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Federal **Rules** of **Appellate Procedure** (Refs & Annos)
Title VII. General Provisions

## Rule 28. Briefs

**(a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

**(1)** a corporate disclosure statement if required by Rule 26.1;

**(2)** a table of contents, with page references;

**(3)** a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

**(4)** a jurisdictional statement, including:

**(A)** the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

**(B)** the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

**(C)** the filing dates establishing the timeliness of the appeal or petition for review; and

**(D)** an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

**(5)** a statement of the issues presented for review;

**(6)** a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

**(7)** a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

**(8)** a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

**(9)** the argument, which must contain:

**(A)** appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

**(B)** for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

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**(10)** a short conclusion stating the precise relief sought; and

**(11)** the certificate of compliance, if required by **Rule** 32(a)(7).

**(b) Appellee's Brief.** The appellee's brief must conform to the requirements of **Rule 28(a)**(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the **appellant's** statement:

**(1)** the jurisdictional statement;

**(2)** the statement of the issues;

**(3)** the statement of the case;

**(4)** the statement of the facts; and

**(5)** the statement of the standard of review.

**(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities--cases (alphabetically arranged), statutes, and other authorities-- with references to the pages of the reply brief where they are cited.

**(d) References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

**(e) References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

**(f) Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

**(g) [Reserved]**

**(h) [Deleted]**

**(i) Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

**(j) Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before decision--a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

CREDIT(S)

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

ADVISORY COMMITTEE NOTES

1967 Adoption

This rule is based upon Supreme Court Rule 40. For variations in present circuit rules on briefs see 2d Cir. Rule 17 [rule 17, U.S.Ct. of App. 2d Cir.], 3d Cir. Rule 24 [rule 24, U.S.Ct. of App. 3d Cir.], 5th Cir. Rule 24 [rule 24, U.S.Ct. of App. 5th Cir.], and 7th Cir. Rule 17 [rule 17, U.S.Ct. of App. 7th Cir.]. All circuits now limit the number of pages of briefs, a majority limiting the brief to 50 pages of standard typographic printing. Fifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, given the page sizes required by Rule 32 and the requirement set out there that text produced by a method other than standard typographic must be double spaced.

1979 Amendments

**Subdivision (g).** The proposed amendment eliminates the distinction appearing in the present rule between the permissible length in pages of printed and typewritten briefs, investigation of the matter having disclosed that the number of words on the printed page is little if any larger than the number on a page typed in standard elite type.

The provision is made subject to local rule to permit the court of appeals to require that typewritten briefs be typed in larger type and permit a correspondingly larger number of pages.

**Subdivision (j).** Proposed new Rule 28(j) makes provision for calling the court's attention to authorities that come to the party's attention after the brief has been filed. It is patterned after the practice under local rule in some of the circuits.

1986 Amendments

While Rule 28(g) can be read as requiring that tables of authorities be included in a reply brief, such tables are often not included. Their absence impedes efficient use of the reply brief to ascertain the appellant's response to

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Title VII. General Provisions

## ➞ Rule 42. Voluntary Dismissal

**(a) Dismissal in the District Court.** Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

**(b) Dismissal in the Court of Appeals.** The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

CREDIT(S)

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

**Subdivision (a).** This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure] without change of substance.

**Subdivision (b).** The first sentence is a common provision in present circuit rules. The second sentence is added. Compare Supreme Court Rule 60.

1998 Amendments

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

CROSS REFERENCES

Briefs, dismissal for default, see Federal Rules of Appellate Procedure Rule 31, 28 USCA.
Costs upon dismissal, see Federal Rules of Appellate Procedure Rule 39, 28 USCA.
Timeliness of docketing, see Federal Rules of Appellate Procedure Rule 12, 28 USCA.

LIBRARY REFERENCES

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Title VII. General Provisions

## ➡ Rule 46. Attorneys

**(a) Admission to the Bar.**

**(1) Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

**(2) Application.** An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

**(3) Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

**(b) Suspension or Disbarment.**

**(1) Standard.** A member of the court's bar is subject to suspension or disbarment by the court if the member:

**(A)** has been suspended or disbarred from practice in any other court; or

**(B)** is guilty of conduct unbecoming a member of the court's bar.

**(2) Procedure.** The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

**(3) Order.** The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

**(c) Discipline.** A court of appeals may discipline an attorney who practices before it for conduct unbecoming a

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member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

CREDIT(S)

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

**Subdivision (a).** The basic requirement of membership in the bar of the Supreme Court, or of the highest court of a state, or in another court of appeals or a district court is found, with minor variations, in the rules of ten circuits. The only other requirement in those circuits is that the applicant be of good moral and professional character. In the District of Columbia Circuit applicants other than members of the District of Columbia District bar or the Supreme Court bar must claim membership in the bar of the highest court of a state, territory or possession for three years prior to application for admission (D.C.Cir. Rule 7 [rule 7, U.S.Ct. of App.Dist. of Col.] ). Members of the District of Columbia District bar and the Supreme Court bar again excepted, applicants for admission to the District of Columbia Circuit bar must meet precisely defined prelaw and law school study requirements (D.C.Cir. Rule 7 1/2 [rule 7 1/2, U.S.Ct. of App.Dist. of Col.] ).

A few circuits now require that application for admission be made by oral motion by a sponsor member in open court. The proposed rule permits both the application and the motion by the sponsor member to be in writing, and permits action on the motion without the appearance of the applicant or the sponsor, unless the court otherwise orders.

**Subdivision (b).** The provision respecting suspension or disbarment is uniform. Third Circuit Rule 8(3) [rule 8(3), U.S.Ct. of App. 3rd Cir.] is typical.

**Subdivision (c).** At present only Fourth Circuit Rule 36 [rule 36, U.S.Ct. of App. 4th Cir.] contains an equivalent provision. The purpose of this provision is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules. It also affords some measure of control over attorneys who are not members of the bar of the court. Several circuits permit a non-member attorney to file briefs and motions, membership being required only at the time of oral argument. And several circuits permit argument pro hac vice by non-member attorneys.

1986 Amendments

The amendments to Rules 46(a) and (b) are technical. No substantive change is intended.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

HISTORICAL NOTES

Termination of United States District Court for the District of the Canal Zone

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 3831 and 3841 to 3843 of Title 22, Foreign Relations and Intercourse.

CROSS REFERENCES

Clerks as prohibited from practicing law, see 28 USCA § 955.
Practice of law prohibited by United States marshal or deputy marshal, see 28 USCA § 568.

LIBRARY REFERENCES

American Digest System

Attorney and Client ⚿ 1 to 8, 34 to 61.
Key Number System Topic No. 45.

NOTES OF DECISIONS

# DECLARATION OF SERVICE BY CERTIFIED MAIL

**CASE NUMBER:** 08-J-12807

I, the undersigned, over the age of eighteen (18) years, whose business address and place of employment is the State Bar of California, 180 Howard Street, San Francisco, California 94105, declare that I am not a party to the within action; that I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for mailing with the United States Postal Service; that in the ordinary course of the State Bar of California's practice, correspondence collected and processed by the State Bar of California would be deposited with the United States Postal Service that same day; that I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit; and that in accordance with the practice of the State Bar of California for collection and processing of mail, I deposited or placed for collection and mailing in the City and County of San Francisco, on the date shown below, a true copy of the within

NOTICE OF DISCIPLINARY CHARGES

in a sealed envelope placed for collection and mailing as certified mail, return receipt requested, Article No.: 7160 3901 9845 6046 9075, at San Francisco, on the date shown below, addressed to:

**James D. Hollister**
**566 South N Street**
**Livermore, California 94550**

in an inter-office mail facility regularly maintained by the State Bar of California addressed to:

**N/A**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on the date shown below.

DATED: November 12, 2008

SIGNED: Carmen Arevalo
Carmen Arevalo, Declarant